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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO.

EXPORT LIQUOR SALES, INC.
Petitioner

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vs.

AMBEK WAREHOUSE COMPANY, INC.
AND DETROIT & CANADA TUNNEL CORPORATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Export Liquor Sales, Inc., petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on May 11, 1970.

OPINIONS BELOW

The following orders were issued by the United States District Court for the Eastern District of Michigan on

October 20, 1969. They have not been officially or unofficially reported and appear in the appendix attached hereto as indicated. Order denying plaintiff's petition for preliminary injunction and dissolving restraining order, Appendix, infra p. 1a. Order Dismissing Action, Appendix, infra p. 3a. Order Denying Stay of Proceedings Pending Appeal, Appendix p. 4a.

The Opinion of the United States Court of Appeals for the Sixth Circuit has not been officially or unofficially reported and is printed in the Appendix, infra p. 5a.

JURISDICTION

The judgment which petitioner is hereby seeking review is the Opinion of the United States Court of Appeals for the Sixth Circuit, entered on May 11, 1970. See Appendix, p. 5a. An Order Granting Petitioner an Extension of Time until October 8, 1970 within which to petition for certiorari was signed by Mr. Justice Black, and entered on August 21, 1970. A copy of this order is printed in the Appendix at p. 8a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a private corporation which operates a major port facility between the United States and Canada may prohibit access of petitioner and its customers to vital U.S. Customs inspection, which is required by federal law in the duty-free importation of liquor, while permitting such access to the one company which had agreed to share its profits with it.

2. Whether a private corporation which operates a major port facility between the United States and Canada may for its own personal gain so impede the free flow of

foreign commerce as to render it impossible for individuals to have their duty-free export merchandise examined by Customs officials as required by federal law unless such merchandise was purchased from the only company permitted to operate at the port.

3. Whether a duty-free liquor export company which conspires with a private port facility serving a separate geographical area to eliminate all competition in the trade at that port and through similar means and other coercive techniques achieves a virtual monopoly in this industry throughout the country has violated federal anti-trust laws.

STATUTES INVOLVED

U.S. Const., Art. I, §§ 8, 9.
15 U.S.C. §§ 1, 2.
19 U.S.C. § 1555.

STATEMENT OF CASE

This action was brought in the United States District Court for the Eastern District of Michigan on October 15, 1963 by your petitioner, Export Liquor Sales, Inc., (hereinafter referred to as "Export") against respondents Ammex Warehouse Company, Inc., (hereinafter referred to as "Ammex") and Detroit & Canada Tunnel Corporation, (hereinafter referred to as "Tunnel".)

The basis of jurisdiction of the court of first instance was 28 U.S.C. § 1331(a) inasmuch as the complaint (printed in the Appendix, infra, p. 9a) charged the defendants-respondents with obstructing plaintiff-petitioner and its customers' access to the United States customs service, with unreasonable interference with the foreign commerce as undertaken by plaintiff, and with violation of federal anti-trust laws prohibiting unreasonable restraint of trade

and monopoly. The relief sought was an injunction against respondents' unlawful interference with plaintiff's business and ordinary and treble damages. A temporary restraining order was granted on October 15, 1968 and a hearing was held on October 25, 1968 on the order to show cause why a preliminary injunction should not issue. In this hearing, the court indicated its intent to deny the preliminary injunction and to dissolve the restraining order. At this point, respondent Tunnel made an *oral motion* to dismiss the complaint for failure to state a claim upon which relief can be granted, which without further argument or briefs was thereupon granted. Appropriate orders were entered October 30, 1968 and the matter was then appealed to the United States Court of Appeals for the Sixth Circuit. This court issued its opinion affirming the decision below on May 11, 1970 which opinion serves as the basis for the instant petition.

This case has erroneously been described by both the district court and the court of appeals as a private antitrust case based upon the exclusive lease arrangement between the Tunnel and Ammex and the consequent unavailability of space on the Tunnel premises for the operation of plaintiff's competitive business. The principal authority cited by both courts is *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279 (1905). A claim that the defendants violated the Robinson-Patman Act, 15 U.S.C. §13(d), has since been dropped from the case and is no longer relevant to a discussion of these proceedings.

Petitioner respectfully suggests that the complaint in this case raised far more serious federal issues than the mere refusal of a utility to lease space on its premises for the carrying on of a business inessential to the operation of the utility *qua* utility. Within the allegations of the

complaint is a claim that the obligation of a private utility which operates a major port facility between the United States and Canada is to provide individuals with access to the United States Customs services as required by law and that the Tunnel cannot restrict one individual's access to vital customs services while granting it to a competitor in order to reap an even larger profit from the undertaking. Another claim advanced in the complaint is that a private utility which controls a major international port facility cannot exercise its own discretion to decide which individuals shall and shall not be permitted to engage in the export of merchandise since this restriction amounts to a vast interference with the free flow of foreign commerce which under the Constitution only Congress has the power to regulate. Finally, the complaint charges a conspiracy to restrain trade and a monopoly of the industry which goes far beyond the mere refusal of the Tunnel to lease space to petitioner; it charges respondents with conspiring to eliminate all competition in the duty-free liquor export business, not only at the Tunnel, which in itself represents a substantial geographical market, but also in the various other ports in the State of Michigan and throughout the rest of the country.

The factual details in support of these claims were never brought out and developed before the courts below because the entire case was dismissed on the pleadings on an oral motion before petitioner had an opportunity to present even affidavits and documentary evidence. Thus, not only is petitioner objecting to the decision below on the grounds that it overlooks the principal issues raised in the complaint, but also that it denies petitioner the opportunity to proceed to develop in court either by pretrial methods or by evidence at trial the full substance of its claims.

In view of the above, petitioner's statement of the case will involve a recitation of the facts which petitioner would prove if offered such an opportunity. It includes not only those facts which are specifically alleged in the complaint, but also those facts which are encompassed in the general allegations, sufficient under notice pleading requirements to apprise respondents of the nature of the claims against them.

The facts which underlie petitioner's claims and which petitioner would be prepared to prove at trial are as follows. Petitioner and respondent Ammex are Michigan corporations engaged in the business of selling liquor duty-free to foreign travellers about to leave the United States under the provisions of 19 U.S.C. § 1555, printed in the Appendix, infra, p. 17a. The law requires that merchandise so exported must be taken from bonded warehouses and delivered to customers once they have been committed to foreign travel and inspected there by Customs so that the goods do not enter the domestic stream of commerce. Respondent Tunnel is a Michigan corporation which either owns or leases and operates a tunnel which connects downtown Detroit, Michigan with downtown Windsor, Ontario in Canada. It provides the principal, if not the only means of vehicular travel between these two cities. The Ambassador Bridge, located four or five miles to the west of the Tunnel, connects Detroit with the major Canadian highway No. 401 and leads to Toronto and other cities further East.

The Tunnel has entered into an exclusive arrangement with respondent Ammex providing it with space on the Tunnel premises for delivery and customs inspection of merchandise after the customer has paid his toll and committed himself to foreign travel. The arrangement further provides that the Tunnel will not permit any competitor of

Ammex to obtain the required customs inspection on tunnel premises, thereby guaranteeing Ammex a virtual monopoly over the vital customs inspection service on this major port facility. In return, Ammex has agreed to pay the Tunnel a fixed percentage of its gross sales. Thus, the less competition for Ammex, the greater its sales and the greater the return to the Tunnel under its arrangement.

On October 14, 1968, the Tunnel commenced a trespass action against petitioner in the Wayne County Circuit Court, State of Michigan and obtained a temporary restraining order against Export's trespassing in connection with its liquor business. This restraining order was dissolved by an order of the federal district court in this action, but was later reinstated when the case was dismissed. Petitioner tried to develop other means of carrying on its business near the Tunnel in order to continue a competitive condition but the Customs department ordered it to cease its new operation on the ground that it interfered with traffic. Enforcement of this Customs order has been temporarily enjoined in a separate federal action which presently pends.

The Tunnel has entered into another lucrative arrangement with Chrysler Corporation, making available to the latter a substantial amount of space to store and expedite shipments of parts to its Canadian subsidiaries under special duty provisions applicable to that situation. The space used by Chrysler has been leased to the Tunnel "for Tunnel purposes" by the City of Detroit for a very nominal rent.

The competitive situation in the duty-free liquor export business is as follows. Respondent Ammex and its various affiliates account for virtually all of the business conducted out of the Michigan-Canadian ports and control approximately ninety percent of such business in the entire country.

This monopoly is made possible by the persistent efforts of Ammex and other companies affiliated through common stock ownership and common and interlocking directors to gain exclusive access to customs inspection in all of the major ports in the country, similar to the arrangement it has with the Tunnel, as outlined above. In addition, these companies have threatened major producers of liquor, and suppliers of cigarettes and perfume to discontinue business with them if they should supply any products to any of their competitors. Finally, these companies have attempted to make no-competition agreements with certain possible competitors in exchange for the freedom to operate unrestricted in their own territory. The obviously harmful effect of such a non-competitive situation is demonstrated by the fact that Ammex was forced to drop its prices 20 to 25 percent immediately upon the opening of petitioner Export's business in December, 1968. The effect of the dismissal of this case and the elimination of petitioner from the competitive picture would certainly be an immediate corresponding increase in prices. Continuation of respondents' unrestricted practices would also obviously result in the inability of any other competitor to enter the market at any time in the future.

REASONS FOR GRANTING THE WRIT

1) Petitioner urges this Court to grant the writ so that it may decide a vital federal question, not effectively reached by the courts below, but very critical to foreign commerce. This issue is whether a private individual can use a natural monopoly position, such as the Tunnel in this case, to discriminate between users with respect to obtaining vital federal government services, such as customs. Respondents contend that the Tunnel functions as a

utility only with respect to non-discriminatory vehicular travel, but not with respect to the availability of customs inspection on articles which travellers seek to take with them.

Such a position is completely untenable. No utility can operate a port facility without making some space available for customs and immigration service. A port requires for its very existence such services so as to permit traffic and merchandise to move in accordance with federal law. As noted above, the Tunnel permits Chrysler Corporation to use special facilities to expedite the shipment of parts to Canada under special customs regulation. Clearly, the Tunnel could not deny other companies permission to use it as a means for exporting comparable items under the same or similar regulations. If the Tunnel had such power, it could conceivably affect the competitive position of all the major manufacturers in this country with subsidiaries in Canada since the Detroit-Windsor port is one of the major access routes between the two countries.

Thus, the question becomes whether the Tunnel, as a utility, can decide that it will permit access to the necessary governmental services for only those kinds of travellers and merchandise which it desires to allow and to refuse access to those individuals or merchandise which it does not wish to use the port. Obviously, the law does not permit private individuals to decide who is entitled to government services and who is not. Such discretion, vested in private individuals and exercised by them for private gain, is intolerable in a civilized society.

2) Petitioner seeks review in order to have this Court decide whether a private corporation having a natural monopoly over a major port facility may forbid the international transaction of certain kinds of businesses or may

regulate them so as to insure itself a substantial portion of all business so conducted. The effect on foreign commerce of respondents' actions in denying petitioner the right to export its merchandise through the Detroit-Windsor Tunnel was only obliquely considered by the courts below. Their decisions rested primarily upon *Donovan v. Pennsylvania Co., supra*, which held that exclusive contracts between railroad stations and a taxicab company providing for the transportation of interstate passengers from one station to another does not in itself violate the federal anti-trust laws. This decision did not deal with a situation where a federally regulated business, such as bonded warehouses and duty-free exports, requires for its very existence certain minimal customs facilities at the port of exit.

The effect on interstate commerce of the *Donovan* decision is negligible inasmuch as other cab companies may presumably continue to operate in the same community even without the right to transfer passengers from one station to the next. However, in the instant case, the effect on foreign commerce is substantial. No duty-free business may operate at the Tunnel port without access to customs inspection. The issue here is not whether the Tunnel must provide space on its premises for any retail liquor stores which wish to operate there, but rather whether it must provide space for U.S. Customs officials so that foreign travellers wishing to purchase duty-free liquor as permitted by federal law may obtain the necessary customs inspection as they leave the country.

Respondent Tunnel, in its brief to the Court of Appeals, argued that its facilities are not large enough to permit more than one export liquor dealer to obtain the necessary customs inspection on its premises and that additional dealers, including petitioner, create an unreasonable interfer-

ence in the operation of the Tunnel and the flow of traffic. Whether petitioner's business does create such a traffic hazard and whether alternative methods are available to circumvent traffic problems on the Tunnel are questions of *fact* and certainly cannot be decided merely on the pleadings. Petitioner contends that its operation at the Tunnel interferes far less with traffic than that of Ammex and that respondents' real objections is petitioner's threatened competition with Ammex's otherwise insulated monopoly position which by virtue of their agreement with the Tunnel makes the Tunnel *defacto* partner of Ammex since the Tunnel receives a portion of Ammex's *gross* sales. In any event, petitioner contends that it is entitled to have its day in court on the issue of creating an unreasonable interference in the operation of the Tunnel.

Under the Constitution, only Congress has the power to regulate foreign commerce. Art. I, § 8. When the State of New York tried to regulate the carrying on of the duty-free liquor export business from its ports, this Court declared that it had no such authority. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964). If a State cannot regulate or interfere with the free flow of foreign commerce in this area, certainly a private port facility should have no such power to interfere in the way respondent Tunnel is attempting to do here. Furthermore, respondents' contract giving the Tunnel a fixed percentage of Ammex's gross sales amounts in effect to a tax on exports which the Constitution forbids any sovereign, including Congress, to impose. Art. I, § 9. Certainly the authority to operate a private major port facility should not carry with it the unrestrained power to control and regulate who may engage in foreign commerce and in what manner. Such a power vested in a private individual unresponsive

to the public need violates both the letter and the spirit of the Constitution and should be abolished.

3) Petitioner urges this Court to review the decision below because of its resulting impact on the general competitive picture in the duty-free liquor export industry. Petitioner asserts anti-trust violations against respondents based primarily upon 15 U.S.C. §§ 1, 2. These provisions outlaw combinations in restraint of trade and monopolies within the meaning of the Act. The facts which support petitioner's contentions in this respect are outlined above. The Tunnel can be shown to serve a geographical area separate from any other vehicular access from Michigan to Canada. The facts show a conspiracy between the respondents to monopolize all trade in this business through the Tunnel and their success in the virtual elimination of all competition at this particular port and throughout the country.

Even the *Donovan* rule discussed *supra* has been held not to apply to situations where companies conspire to eliminate competition in obtaining exclusive franchises from utilities. In *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1946), this Court held that taxicab companies could not agree to refrain from competing with each other in obtaining a railroad station franchise, such as the one approved in *Donovan*. Petitioner contends that a similar situation is involved in this case, that Ammex and its affiliates have agreed not to compete at any of the ports involved and that respondent Tunnel has acceded to Ammex's monopolistic pressure by agreeing to keep petitioner and all other potential competition out of its port facility for a percentage of Ammex's gross sales. Thus, the facts in this case go far beyond the lower court's characterization that the Tunnel's mere refusal to lease

operate a retail liquor store on its premises does not constitute a violation of the anti-trust laws. The effective elimination of all competition through coercive means does constitute such a violation, which petitioner if give a chance would prove at trial.

In conclusion, petitioner urges this Court to grant the writ because the decision below has effectively denied it the opportunity to present proofs in court which would demonstrate respondent Tunnel's discrimination against it with respect to obtaining vital customs inspection on its premises, respondent Tunnel's unreasonable interference with the free flow of commerce at this vital port facility, and finally the virtual elimination of all effective competition in this industry brought about by the joint actions of both respondents. Petitioner contends that the issues involved are very important as they apply to the sensitive operations of all private port facilities and as they affect the entire competitive siutation in this industry. The magnitude of the growth of foreign travel makes a determination of these issues of vital importance to the country.

CONCLUSION

For the foregoing reasons, petitioner urges this Court to grant the petition for writ of certiorari and to reverse the decision below so that the matter can be set for trial.

Respectfully submitted,
LEBENBOM AND MORGANROTH
By: David Lebenbom
2118 Guardian Building
Detroit, Michigan 48226
313-963-6666
Attorneys for Petitioner,
Export Liquor Sales, Inc.

U.S. District Court, Eastern District, Mich.

ORDER DENYING PLAINTIFF'S PETITION FOR PRELIMINARY INJUNCTION AND DISSOLVING RESTRAINING ORDER

At a session of said Court held in the Federal Building, Detroit, Michigan on the 30th day of October, 1968.

PRESENT: HONORABLE FRED W. KAESS, District Judge

This cause having come on to be heard on an Order of this Court entered October 15, 1968 directing Defendant Detroit & Canada Tunnel Corporation to Show Cause Why A Preliminary Injunction Should Not Issue enjoining said Defendant from proceeding in any manner with its action number 119900 pending in the Wayne County Circuit Court against Plaintiff, Export Liquor Sales, Inc., and after reviewing the file in this action, and after reading and considering the briefs filed by the parties, and after hearing and considering oral arguments by the parties, this Court being fully advised in the premises,

IT IS HEREBY ORDERED that Plaintiff's petition for a preliminary injunction against Defendant Detroit & Canada Tunnel Corporation enjoining said Defendant from proceeding in any manner with its cause of action in the Wayne County Circuit Court being Civil Action Number 119900 entitled Detroit & Canada Tunnel Corporation, Plaintiff v. Export Liquor Sales, Inc., Defendant, be, and the same hereby is, denied.

IT IS FURTHER ORDERED that the Temporary Restraining Order issued by this Court on October 15, 1968, restraining Defendant Detroit & Canada Tunnel Corporation from proceeding in any manner whatsoever

with its cause of action in the Wayne County Circuit Court Civil Action Number 119900, be, and the same hereby is, dissolved.

IT IS FURTHER ORDERED that the Order of this Court entered on October 15, 1968 dissolving the Temporary Restraining Order issued by the Wayne County Circuit Court, Honorable Joseph G. Rashid, presiding, on October 14, 1968, be, and the same hereby is, rescinded and vacated.

/s/ Fred W. Kaess
District Judge

Approved as to form:
/s/ Timothy Wittlinger
Attorney for Defendant
/s/ Fred Morganroth
Attorney for Plaintiff

ORDER DISMISSING ACTION (D.C. Mich. E.D.)

At a session of said Court held in the Federal Building, Detroit, Michigan, this 30th day of October, 1968.

PRESENT: HONORABLE FRED W. KAESS, District Judge

This cause having come on to be heard on Defendant Detroit & Canada Tunnel Corporation's motion to dismiss for failure of Plaintiff's complaint to state a cause of action upon which relief can be granted, and after reviewing the file in this action, and after reading and considering the briefs filed by the parties, and after hearing and considering oral argument by the parties, this Court being fully advised in the premises,

IT IS HEREBY ORDERED that this action be, and the same hereby is, dismissed, without costs to either party, for the reason that Plaintiff's Complaint does not state a claim upon which relief can be granted.

/s/ Fred W. Kaess
District Judge

Approved as to form:
/s/ Fred Morganroth
Attorney for Plaintiff
/s/ Timothy Wittlinger
Attorney for Defendant

ORDER DENYING STAY OF PROCEEDINGS PENDING APPEAL

At a session of said Court held at the Federal Building, Detroit, Michigan, this 30th day of October, 1968.

PRESENT: HONORABLE FRED W. KAESS, District Judge

A motion having been made by the Plaintiff for a stay of proceedings, pending appeal from this Court's order denying an Order to Show Cause why the State Court proceedings should not be enjoined and for dismissal of Plaintiff's Complaint, and the Court being fully advised in the premises.

IT IS HEREBY ORDERED that Plaintiff's motion for a stay of proceedings, pending appeal from this Court's order denying Order to Show Cause for a permanent injunction enjoining the Defendants from proceeding in the Wayne County Circuit Court, pending appeal, be and hereby is denied, and

IT IS FURTHER ORDERED that pursuant to the provisions of Title 28, U.S.C. § 1292(b), that the Court's denial of Plaintiff's Order to Show Cause involves a controlling question of federal law to which there is a substantial ground for difference of opinion and that an immediate appeal from said order may materially advance the ultimate termination of the issue.

/s/ Fred W. Kaess
District Judge

Approved as to form:
LEBENBOM, HANDLER, BRODY & MORGANROTH
By /s/ Fred Morganroth
Attorneys for Plaintiff
HILL, LEWIS, ADAMS & GOODRICH

By /s/ Timothy D. Wittlinger
Attorneys for Defendants

• • •

Opinion of Court of Appeals
Decided and Filed May 11, 1970.
Before: PHILLIPS, Chief Judge; McCREE and EDWARDS, Circuit Judges.

McCREE, Circuit Judge. This is an appeal from the dismissal of a private antitrust suit for failure to state a claim on which relief could be granted. The facts are not in dispute. Appellee Detroit & Canada Tunnel Corporation owns or leases a vehicular tunnel between Detroit, Michigan, and Windsor, Ontario, and other property adjacent to the tunnel entrance in Detroit. Appellee Ammex Warehouse Company carries on an export liquor business. It sells liquor in the United States to persons about to enter Canada, and delivers the liquor to them on premises leased from the Tunnel Corporation beyond the toll gates at a location where travellers are irrevocably committed to foreign travel. Ammex has an exclusive contract with the Tunnel Corporation to conduct this business on tunnel premises, and for this privilege pays the Tunnel Corporation a certain percentage of its total sales. If liquor is exported in this manner, it may be purchased free of certain taxes and duties, and thus at a considerably lower price than in retail outlets in Michigan or Ontario.

Appellant Export Liquor Sales, Inc., apparently recognized the lucrative nature of this business and decided to compete with Ammex. Unable to acquire a tunnel location because of Ammex's exclusive lease, appellant secured premises near the tunnel entrance where it sold and issued receipts for liquor. Hired runners entered tunnel premises

and delivered the merchandise to purchasers after they had paid the toll and committed themselves to cross the international boundary.

The Tunnel Corporation objected to these activities and brought suit in the Wayne County Circuit Court in Detroit to enjoin Export Liquor from trespassing on its premises. That court issued a temporary restraining order, and Export Liquor filed this suit in the United States District Court for damages and injunctive relief because of alleged antitrust violations.

We consider, first, appellant's contention that appellees have violated the Robinson-Patman Act, 15 U.S.C. § 13(d), because the Tunnel Corporation has in effect given Ammex a monopoly of export liquor sales in the Detroit-Windsor Tunnel. It is doubtless true that monopoly is a consequence of the Tunnel Corporation-Ammex lease, but the Robinson-Patman Act prohibits only price discrimination in the sale of goods. The Act is not concerned with what we have here (assuming arguendo that the exclusive lease amounts to price discrimination), a lease of realty. See *Gaylord Shops, Inc.* v. *Pittsburgh Miracle Mile Town & County Shopping Center*, 219 F.Supp. 400 (W.D. Pa. 1963). We agree that the Robinson-Patman count was properly dismissed.

Appellant also alleges that appellees' conduct violates the Sherman Act, 15 U.S.C. §§ 1, 2. This contention is untenable in view of *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279 (1905), in which the Supreme Court recognized the right of a railroad company operating a terminal to have an exclusive arrangement with one taxi company on its premises. In other words, a corporation with control over a unique location essential to the conduct of a certain kind of business can lease a part of that location to one entity and thereby

give it an effective monopoly without violating the Sherman Act.

• • •

Despite its age, *Donovan* enjoys continued vitality. See *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52, 56 (1st Cir. 1966); *Parmalee Transp. Co.* v. *Keeshin*, 292 F.2d 794 (7th Cir. 1961), cert. denied, 368 U.S. 944, reh. denied, 368 U.S. 972 (1962); *Friend* v. *Lee*, 221 F.2d 96, 100 n. 5 (D.C. Cir. 1955); *cf. Savon Gas Stations #6, Inc.* v. *Shell Oil Co.*, 309 F.2d 306 (4th Cir. 1962), cert. denied, 372 U.S. 911 (1963). And of course the Robinson-Patman Act did not reverse the *Donovan* rule insofar as it is relevant here, because, as we have seen, the Act has no application to this case.

Under the *Donovan* holding, the Tunnel Corporation may lease to Ammex and refuse to lease to Export Liquor space on the tunnel premises, so long as it does not discriminate among users of the utility *qua* utility, *i.e.*, motorists driving through the tunnel. We agree with the District Court that appellant's complaint does not state a cause of action under the Sherman Act.

The decision of the District Court is affirmed.

Order of Supreme Court of the United States

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 8, 1970.

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 21th day of August, 1970.

• • •

COMPLAINT (D.C. Mich. E.D.)
(Filed October 15, 1968)

Now comes EXPORT LIQUOR SALES, INC., a Michigan corporation, by its attorneys, LEBENBOM, HANDLER, BRODY & MORGANROTH, and for its complaint against Defendants states as follows:

1. This Complaint is filed and these proceedings are instituted against the above-named Defendants under Section 15 and 26 of Title 15, U.S.C., being part of the Act of Congress on July 2, 1890, entitled, "An act to protect trade and commerce against unlawful restraint and monopolies," as amended, commonly known as the Sherman Act and the Clayton Act. The purpose of this action is to recover damages against the above-named Defendants for injuring Plaintiff in its business of the retail sale of liquor for export in the City of Detroit, County of Wayne, State of Michigan, which injury proximately resulted from the Defendants' violations of the Anti-Trust Laws of the United States; and to restrain and enjoin the Defendants from continuing the illegal monopoly and the combination conspiracies and contracts in restraint of Plaintiff's trade and commerce.

2. The business of the export sale of alcoholic beverages at retail and the business of the operation of a tunnel facility between the United States and Canada are within or directly affect trade and commerce among the several states and the United States and Canada. In the course of the retail sale of alcoholic beverages for export, a constant and continuous stream of trade and commerce exists between the states and foreign countries, consisting of solicitation and sale of alcoholic beverages to travelers abroad for use in foreign countries. The business of the operation of a tunnel between the United States and Canada

by its nature consists of the operation of business of trade and commerce between the United States and a foreign country.

3. The Plaintiff, EXPORT LIQUOR SALES, INC., is a Michigan corporation with its principal place of business in the City of Detroit, County of Wayne, State of Michigan. Plaintiff operates, and has since September 21, 1965, operated a retail liquor sales facility at or near the vicinity of Defendant's tunnel facility into Canada.

4. Defendant AMMEX WAREHOUSE COMPANY, INC. is, and at all times herein mentioned is, a corporation organized and existing under the laws of the State of Michigan and engaged in the business of the retail sale of alcoholic beverages to travellers from the United States to Canada and other foreign countries, with its retail outlet located directly on Defendant DETROIT & CANADA TUNNEL CORPORATION's tunnel facility.

5. Defendant DETROIT & CANADA TUNNEL CORPORATION is, and at all times herein mentioned is, a corporation organized and existing under the laws of the State of Michigan, and is engaged in providing tunnel facilities between the United States and Canada and, in addition thereto, in the rental of facilities from commercial establishments for the purpose of sale of goods and/or services to travellers travelling abroad. That the said Defendant DETROIT & CANADA TUNNEL CORPORATION has and maintains an exclusive license, agreement, franchise and monopoly for the operation of a tunnel facility between the United States and Canada from the City of Detroit to the Country of Canada.

6. Beginning at an exact date unknown to Plaintiff, and continuing uninterrupted for years thereafter up to and including the date of the filing of this Complaint, the

Defendants, well knowing the facts herein alleged, have restrained trade and commerce in the interstate and foreign distribution of alcoholic beverages, by contracting, combining and conspiring with each other and each Defendant corporation within itself by and through its officers and employees in restraint of such trade and commerce, contrary to Sections 1, 2 and 13 of the Act of Congress, commonly known as the Sherman Act (15 U.S.C.A., Sections 1, 2 and 13) and have thereby substantially lessened, limited and restrained competition in said trade and commerce, and have prevented and prohibited Plaintiff from the sale of alcoholic beverages at retail to foreign travellers. Such combination, conspiracy and contract tend to and do actually restrain and monopolize interstate and foreign commerce in the sale of alcoholic beverages at retail for foreign consumption. More particularly, Defendants have done and are continuing to do the following acts:

A. Arbitrarily, unfairly and wrongfully refusing to permit the Plaintiff access to the United State Customs Officers on the tunnel property, refusing to permit Plaintiff or its merchandise to come on the tunnel property, which is a violation of their rights as citizens since said tunnel is used for interstate commerce, and even refusing to permit a representative of the Plaintiff to accompany a customer in the customer's vehicle through customs.

B. Refusing to rent or make available to Plaintiff like facilities of Defendant DETROIT & CANADA TUNNEL CORPORATION's property at a similar charge as is made to Defendant AMMEX WAREHOUSE COMPANY, INC., and thus endeavoring to monopolize the business of the retail sale of alcoholic beverages to travellers abroad by and through Defendant DETROIT & CANADA TUNNEL CORPORATION's facility.

C. Conspiring and agreeing between themselves to distribute a portion of the proceeds of the Defendant AMMEX WAREHOUSE COMPANY, INC. to Defendant DETROIT & CANADA TUNNEL CORPORATION and in order to increase the said sums, which Defendants divide and distribute between themselves, to force Plaintiff to pay additional sums in order to maintain Plaintiff's business operation, and thus force Plaintiff to be non-competitive and requiring Plaintiff to secure facilities of such a nature as to make it impossible for Plaintiff to effectively compete with Defendant AMMEX WAREHOUSE COMPANY, INC.

D. Permitting Defendant AMMEX WAREHOUSE COMPANY, INC. to enjoy a monopolistic position in the operation of a retail liquor facility for sale to travellers abroad.

E. Favoring Defendant AMMEX WAREHOUSE COMPANY, INC. and discriminating against Plaintiff with respect to the terms and use of the Defendant DETROIT & CANADA TUNNEL CORPORATION's tunnel facility for Plaintiff's sole purpose of complying with the statutes and rules and regulations of the United States Customs Office.

F. Prohibiting Plaintiff from the use of the United States Government Custom's Office on the Defendant DETROIT & CANADA TUNNEL CORPORATION's tunnel facility without the payment of a charge for such use.

7. Plaintiff believes and, therefore, alleges that Defendants, in their acts as complained of herein above, did so by agreement.

8. That Plaintiff believes and, therefore, alleges that since it has opened its business facility, the Defendants

have used their position to give clear, preferential terms and conditions to Defendant AMMEX WAREHOUSE COMPANY, INC. which are not offered to the Plaintiff.

9. That Plaintiff at all times herein mentioned has desired to operate its facility on a competitive basis with the Defendant AMMEX WAREHOUSE COMPANY, INC. and has so informed Defendant DETROIT & CANADA TUNNEL CORPORATION.

10. By the reason of the monopoly of the Defendants and of the combinations, and conspiracies and otherwise illegal and wrongful activity and restraint of Defendants as aforesaid, the business of Plaintiff has been seriously impaired, injured, and damaged and Plaintiff has suffered great damage, operating losses, and loss of profits; that the good will, reputation and prestige of Plaintiff has been seriously and irreparably damaged and injured, all to the unfair and wrongful advantage of Defendants. Plaintiff has been compelled and is paying unreasonable and discriminatory fees and has been compelled and is compelled to be located at an inferior facility on unfair and discriminatory terms in the operation of its business to the damage and loss of Plaintiff and to the advantage of Defendants; and Plaintiff is losing patronage and good will and otherwise continues to be threatened with further loss and damage and injury by reason of the Defendants' violation of the Anti-Trust Laws of the United States.

11. Plaintiff's investment in its retail sales operation is dependent upon its location and its cost of operation, as well as its right to the free and untrammeled use of the United States Government facilities located on Defendant DETROIT & CANADA TUNNEL CORPORATION's facility and Plaintiff's operation is being depreciated in value by reason of the acts of Defendants as hereinbefore alleged.

12. Plaintiff's losses to date as the result of the Defendants' violations of the Anti-Trust Laws as aforesaid are in excess of Fifty Thousand ($50,000.00) Dollars. Plaintiff will suffer damages in the future in a sum or sums at this time unknown and when the extent thereof shall be ascertained, Plaintiff will seek leave to amend this Complaint to set forth the amount of said losses.

13. Plaintiff fears and is justly apprehensive that Defendant DETROIT & CANADA TUNNEL CORPORATION will prohibit Plaintiff from the use of the United States Customs office facility located on the tunnel for and in pursuance of his business operation by virtue of the statutes, rules and regulations of the United States and the United States Customs Department, unless said Defendant be restrained by an Order of this Court from so doing during the pendency of this action or until further Order of this Court.

WHEREFORE, Plaintiff prays as follows:

A. That Summons issue to each of the Defendants, commanding each to appear herein and to answer the allegations contained in this Complaint, and to abide by and perform such Orders and decrees as the Court may make in the premises.

B. That Plaintiff receive with interest as damages for the injury to its business the sum of Fifty Thousand ($50,000.00) Dollars, and that said sum be trebled to One Hundred Fifty Thousand ($150,000.00) Dollars, and that the Court award a reasonable attorney fee is accordance with Section 4 of the Clayton Act (15 U.S.C. Section 15) in such cases made and provided.

C. That Defendant DETROIT & CANADA TUNNEL CORPORATION be enjoined and restrained during the pendency of these proceedings from in any manner pro-

hibiting or preventing Plaintiff from the free, continuous and untrammeled use of the United States Customs facility located on Defendant DETROIT & CANADA TUNNEL CORPORATION's tunnel facility and that it be restrained during these proceedings and until further order of this Court from attempting to make any charge therefor.

D. That Defendants, and each of them, be permanently enjoined and restrained from each and every one of the unlawful practices alleged in Plaintiff's Complaint.

E. That the aforesaid combination and conspiracy, contracts, agreements, arrangements, and understanding in restraint of interstate trade and commerce, conspiracy to monopolize, attempts to monopolize and monopolization of interstate trade and commerce be adjudged and decreed to be unlawful, and that the contracts, agreements, arrangements and understanding and practices alleged in this Complaint be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Act.

F. That the Court adjudge and decree that the Defendants have combined and conspired to restrain unreasonably and have conspired to monopolize, attempted to monopolize and have monopolized the interstate trade and commerce in the retail sale of alcoholic beverages to travelers for use abroad in violation of Section 1 and 2 of the Sherman Act.

G. The Defendants, and any of their subsidiaries or affiliated companies, their officers, directors, agents and employees and their respective successors, assignees or transferees be enjoined from agreeing, combining, conspiring or contracting with each other or with any other person or corporation whatsoever to restrain, control or eliminate competition among themselves or with others, from restraining in any way and from agreeing on the

prices, terms, or conditions in the retail sale of alcoholic beverages to travellers for use abroad or from conspiring or attempting to monopolize, or monopolizing the interstate trade and commerce herein alleged.

H. That Plaintiff recover its costs herein; and

I. That Plaintiff have such other and further relief as the Court may deem proper.

LEBENBOM, HANDLER, BRODY & MORGANROTH
By /s/ Fred Morganroth
Attorneys for Plaintiff
2118 Guardian Building
Detroit, Michigan 48226
963-6666

Dated: October 15, 1968

UNITED STATES CONSTITUTION, ART. I

§ 8. The Congress shall have the power . . . to regulate Commerce with foreign Nations.

§ 9. No Tax or Duty shall be laid on Articles exported from any State . . .

19 U.S.C. § 1555. Bonded Warehouses

Buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for the repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the

owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse. June 17, 1930, c. 497, Title IV, § 555, 46 Stat. 743.

15 U.S.C. §§ 1, 2. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in

competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

15 U.S.C. § 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on convication thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.